

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 03 February 2003**

Case No. 2002-STA-6

In the Matter of

Christopher J. Hoff,  
Complainant

v.

Mid-States Express, Inc.,  
Respondent

**APPEARANCES:**

Joanne Kinoy, Esquire  
For the Complainant

Richard M. Furgason, Esquire  
For the Respondent

Before: ROBERT J. LESNICK  
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER**

This action arises under the whistle blower provisions of the Surface Transportation Assistance Act ("STAA" or "the Act"), 49 U.S.C. § 31101 *et seq.*, and the regulations promulgated thereunder in 29 C.F.R. Part 1978 ("the Regulations"). Specifically, the Complainant alleges that he was improperly discharged in reprisal for refusing to operate a commercial vehicle in violation of federal safety regulations and for filing a formal complaint with the Federal Motor Carrier Safety Administration.<sup>1</sup> The claim for discriminatory termination falls under Section 31105 of the Act.

**Factual and Procedural History**

The Complainant was hired by the Respondent in August 1998. (TR 20). He initially worked as a dock man at the Respondent's Ladd, Illinois facility, loading and unloading trailers,

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<sup>1</sup> See U.S. Dep't. of Labor, OSHA "Discrimination Case Activity Worksheet," Item 9.

counting freight, and organizing freight on the trailers. (*Id.*) After approximately eight months on the dock, the Complainant accepted a position as a driver. (TR 21). In mid-1999, Mr. Hoff bid on and received a designated route, known as the Angola-meet run. (TR 22, 208). This designated run involved driving from Ladd, Illinois to the Respondent's terminal in Plainfield, Illinois. (TR 23). In Plainfield, he would switch loads, and drive to a meeting spot in Angola, Indiana, where he would swap trailers with the Cleveland driver. (TR 25-26). From Angola, he would usually return to the Ladd terminal. (TR 22, 26). After returning to the Ladd terminal, Mr. Hoff testified that he would complete his paperwork, including his pay sheets, log books, and inspection forms. (TR 26-27).

The first incident that sparked conflict between the Complainant and his employer was a fine that Mr. Hoff received on July 31, 2000. After picking up the trailer from the Cleveland driver in Angola, Mr. Hoff stopped at the weigh scales in Frankfort, Illinois. (TR 30). It was determined that Mr. Hoff's trailer was overweight and he received a fine of \$405. (RX 21). The Respondent paid the fine with a credit card, and the Complainant was allowed to leave the scales after sliding the trailer's axles back to redistribute the center of gravity in the trailer. (TR 30).

Mr. Hoff stated that he repeatedly talked to the company's "Linehaul" about responsibility for the fine. (TR 32). According to the Complainant, before a determination from Linehaul was made, Dave Pattelli, the Ladd terminal manager, asked him to sign a payroll deduction form. (TR 34). The participants' stories conflict regarding who escalated the discussions into shouting matches peppered with expletives; however, it is clear that the exchanges became heated. There were several witnesses to these discussions on August 15, 2000. After the incident, the Complainant drafted a letter, which was signed by several witnesses, including Angela Hewitt,<sup>2</sup> Bob Eads, Gene Bacula, and Rich Fandell. (CX 2; TR 35).

A few days after the Complainant refused to sign the payroll deduction form for the cost of the ticket, the Complainant testified that Lonnie Osborn, then the Respondent's Outbound Reship Manager, handed him a form indicating that he was suspended until he signed the payroll deduction form. (TR 43-44; CX 3). The Complainant was suspended from August 21, 2000 until approximately August 24, 2000, when he signed the payroll deduction form. (TR 44-46). Also on August 24, the Complainant drafted another letter, documenting the events and discussions that had taken place since the July 31, 2000 ticket (CX 5), and Mr. Hoff submitted this letter to the U.S. Department of Transportation's Federal Motor Carrier Safety Administration ("FMCSA") via facsimile. (TR 47-48; CX 6). According to Mr. Hoff, he showed a copy of his letter to several co-workers and informed Mr. Pattelli that he submitted a complaint. (TR 49-50).

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<sup>2</sup> Ms. Hewitt originally signed the letter. At the hearing, however, she stated that she later asked the Complainant to remove her name, citing some disagreements with portions of his account. (TR 194).

The FMCSA subsequently responded, noting Mr. Hoff's complaints and informing him that they would be conducting an investigation. (CX 7).

Mr. Hoff returned to work on August 24, 2000. He did not show up for work on September 1, 2000, and did not call off work. The Complainant believed that he was approved for a personal day, pursuant to an previously signed leave approval form. (CX 8). At the time, the Respondent had no recollection of the leave, and thus, on September 5, 2000, Mr. Pattelli suspended the Complainant for a "no call, no show" violation for his September 1, 2000 absence. (TR 55, 168-170). Mr. Hoff stated that he spoke with Joe Baker, the Respondent's Director of Operations, but received no relief from his suspension. The Complainant next sought to discuss the matter further with Mr. Pattelli. The two men first spoke on the phone on September 7, 2000. (TR 64). Later that evening, Mr. Hoff went to the terminal and spoke briefly with Mr. Pattelli. The discussion became heated, with Mr. Pattelli eventually saying that he would call the police, if the Complainant did not leave. (TR 66, 176).

After this meeting, Mr. Hoff believed that he had been terminated. (TR 67). Thus, he did not return to work on September 8, 2000, which was supposed to be his first day at work after the September 5, 2000 suspension. On September 11, 2000, the Complainant called Mr. Osborn, his immediate supervisor, and inquired as to whether Mr. Osborn was aware that Mr. Hoff had been terminated. (TR 69). According to Mr. Hoff, Mr. Osborn stated that he would call back. (*Id.*) Mr. Osborn then allegedly requested the Complainant to come to the terminal and sign a resignation form. (*Id.*) According to the Respondent, Mr. Hoff's employment ended on September 11, 2000, by resignation. (RX 16).<sup>3</sup>

The Complainant testified that he called the FMCSA's John Mulcare to inform him that he (Mr. Hoff) had been terminated. (TR 74). He further stated that he continued to contact the FMCSA approximately once a month to check on the status of the investigation. No records of these calls were submitted. On May 30, 2001, Mr. Mulcare sent a letter to Terry Hartman, President of Mid-States Express. (CX 13). In that letter, Mr. Mulcare noted that an audit of the Respondent had been conducted, and as a result, the company was charged with one violation of failing to conduct post-accident testing on a driver for alcohol/controlled substances. (*Id.*) The company was also charged with thirty-seven violations of false reports of records of duty status. (*Id.*) On July 31, 2001, Mr. Mulcare notified Mr. Hoff that the matter with Mid-States Express had been investigated, instances of noncompliance discovered, and an enforcement case prepared. (CX 10).

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<sup>3</sup> Mr. Hoff never signed his resignation form. However, the notation on the termination form states, "Chris resigned his position on the night of 9/11 (7:40 p.m.) to Lonnie Osborn. He did this over the phone." (RX 16). Mr. Osborn later testified, "He said he was done. He couldn't do it no more." (TR 210).

Mr. Hoff is to be commended for his efforts. He reported the company's violations of safety and reporting rules, which were ultimately substantiated by the FMCSA and subsequently addressed through agency enforcement action. Mr. Hoff took a significant risk to advance safety and other protections for his fellow truck drivers.

The Complainant asserts that, only upon receiving the July 31, 2001 letter, did he realize that FMCSA was not investigating his allegations of threats and retaliatory discharge.<sup>4</sup> He thus filed his claim with the U.S. Department of Labor, Occupational Safety and Health Administration ("OSHA") on August 29, 2001.<sup>5</sup> On September 13, 2001, OSHA issued its "Secretary's Findings." After reviewing the facts, the Area Director dismissed the complaint, concluding that it was untimely filed. On October 11, 2001, the Complainant filed a timely appeal of the OSHA findings to the Office of Administrative Law Judges.

#### Applicable Law

Under the Act, a person "may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because the employee ... has filed a complaint ... related to a violation of a commercial motor vehicle safety regulation, standard or order."<sup>6</sup> Likewise, an employee cannot be discriminated against or disciplined for refusing to operate a vehicle because "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health, or the employee has a reasonable apprehension of serious injury to" himself or to the public because the vehicle is unsafe.<sup>7</sup> An employee who alleges a violation of subsection (a) may file a complaint with the Secretary of Labor within 180 days after the alleged violation occurred.<sup>8</sup>

In order to make a *prima facie* case under the Act, the complainant must prove that: (1) he engaged in protected activity under the STAA; (2) he was subjected to adverse action; (3) respondent was aware of the protected activity when it took the adverse action; and (4) that there was a causal nexus between his protected activity and the employer's adverse action.<sup>9</sup>

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<sup>4</sup> Complainant Hoff's Post Hearing Brief, at 13 (Sept. 3, 2002).

<sup>5</sup> U.S. Dep't. of Labor, OSHA "Discrimination Case Activity Worksheet."

<sup>6</sup> 49 U.S.C. § 31105(a)(1)(A).

<sup>7</sup> 49 U.S.C. § 31105(a)(1)(B).

<sup>8</sup> 49 U.S.C. § 31105(b).

<sup>9</sup> See, e.g., *Frechin v. Yellow Freight Systems, Inc.*, 1996-STA-34 (ALJ Sept. 12, 1997) (aff'd ARB Jan. 13, 1998). See also *Forrest v. Transwood Logistics, Inc.*, 2001-STA-43 (ALJ

### Discussion

The Respondent first asserts that the claim filed by Mr. Hoff was untimely. According to the Respondent, the Complainant failed to file his claim with the Secretary of Labor within the 180-day period. The Respondent further notes that this claim was filed with OSHA on “August 29, 2001, almost 12 months after the date of the alleged violation.”<sup>10</sup> The adverse action used by the Respondent to measure the 180 days is Mr. Hoff’s assertion that he was fired; thus, the Respondent argues that the 180-day period commenced on September 7, 2000. Moreover, the Respondent argues that the August 24, 2000 letter to FMCSA cannot constitute a complaint because it was submitted before the adverse action and to the incorrect agency.

The Complainant, however, argues that his claim was filed in a timely manner. After a dispute over the repayment of a fine, and a three-day suspension, Mr. Hoff filed a complaint with FMCSA. Twelve days later, the Complainant was suspended again for a no call/no show violation; his efforts to prove his absence was previously approved were ignored. On September 7, 2000, the Complainant believed he was discharged. Despite an absence of corroboration, the Complainant asserts that he contacted FMCSA to inform them of his termination, and continued to check on the status of their investigation. During that time, Mr. Hoff also consulted an attorney.

At no time during this process, however, did Mr. Hoff file a complaint with OSHA, as required by the Regulations. He ultimately filed his OSHA complaint on August 29, 2001. The Complainant asserts that he believed FMCSA was investigating his complaints, and only upon receiving their July 31, 2001 report, did he realize no such investigation had occurred. Due to these circumstances, the Complainant argues that his August 24, 2000 complaint, and his subsequent verbal notification of his termination to FMCSA, constitute an STAA complaint. The Complainant further argues that the circumstances of this case entitle him to the equitable tolling provided for in the Regulations.

According to Section 1978.102(d) of the Regulations, a complaint may be filed within 180 days after the alleged violation.<sup>11</sup> The Regulations, however, provide for circumstances that justify the tolling of the 180-day period. This tolling is based on “recognized equitable principles or because of extenuating circumstances.”<sup>12</sup>

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Aug. 7, 2001) (aff’d ARB Jan 25, 2002) (citing *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6<sup>th</sup> Cir. 1987)).

<sup>10</sup> Respondent’s Brief and Argument, at 3 (Aug. 30, 2002).

<sup>11</sup> 29 C.F.R. § 1978.102(d)(1).

<sup>12</sup> 29 C.F.R. § 1978.102(d)(3).

The Complainant thus argues that, by filing a complaint and advising the federal agency of his subsequent termination, he did what was required of him under the statute. The Complainant cites cases such as *Harrison v. Roadway Express, Inc.*, and *Reemsnyder v. Mayflower Transit, Inc.*, to support his claim. In *Harrison*, the complainant filed a grievance after he was suspended.<sup>13</sup> He was then fired, and again, filed a grievance.<sup>14</sup> The complainant then visited the local OSHA office and orally complained about his suspension and termination, but was told that OSHA would not accept his complaint until the grievance arbitration process had been exhausted.<sup>15</sup> When the termination was upheld, the complainant notified OSHA, who then found the complaint untimely because it was filed outside the 180-day window.<sup>16</sup> The Administrative Law Judge concluded that the verbal complaint was sufficient in form, and that the respondent had sufficient notice prior to the formal hearing.

In *Reemsnyder*, the Administrative Law Judge determined that the complainant was terminated on April 18, 1991.<sup>17</sup> The complainant contacted OSHA by telephone in July 1991.<sup>18</sup> After not receiving an update on his claim, the complainant contacted his U.S. Senator's office, which sent a letter to OSHA on October 11, 1991.<sup>19</sup> The complaint was finally documented by OSHA on October 21, 1991.<sup>20</sup> The Judge concluded that the telephone contact with OSHA, as well as the letter from Senator Sasser's office, was sufficient to constitute a timely filing of an OSHA complaint.<sup>21</sup> The Judge noted that "equitable tolling has been found to be proper in whistle blower cases where a complainant has raised the statutory issue in question, but has done so in the wrong forum."<sup>22</sup> The Judge went on to say that "Reemsnyder's mistaken belief that

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<sup>13</sup> *Harrison v. Roadway Express, Inc.*, 1999-STA-37 (ALJ Dec. 16, 1999).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Reemsnyder v. Mayflower Transit, Inc.*, 1993-STA-4 (ALJ Nov. 12, 1993).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

DOT would also pursue his § 2305 claim if it substantiated his allegations of safety violations would justify an equitable tolling of the 180 day period for an additional six days.”<sup>23</sup>

In both cases, the complaint was not initially written. However, unlike the instant case, both complainants contacted OSHA, the proper agency, within the 180-day window to file a claim. In *Harrison*, OSHA rebuffed the complainant’s efforts to file a complaint, and caused his untimely filing. His initial contact with the agency was deemed sufficient to preserve his claim. In *Reemsnyder*, again, the complainant contacted OSHA, and had a subsequent claim filed for him by his U.S. Senator. Here, the Complainant contacted FMCSA, under the Department of Transportation. At no time prior to August 29, 2001, did the Complainant attempt to contact OSHA. Moreover, while he alleges that he continued to contact the FMCSA to update them on his status, he provided no proof of his contacts; nor does he allege he was misled by the federal agency.

The Complainant failed to contact OSHA, but relies on the Judge’s invocation of the equitable tolling doctrine in *Reemsnyder*. Unfortunately, the Complainant cannot save his claim from being dismissed under that argument either. The Judge in *Reemsnyder* addressed the purpose of equitable tolling and how it applied to that case. In the present matter, I find the Regulations guiding. The Regulations clearly state that “filing with another agency [is an example] of circumstances which do not justify a tolling of the 180-day period.”<sup>24</sup>

In his August 24, 2000 letter to the FMCSA, the Complainant documented violations of safety and reporting rules by the Respondent. His only claim of adverse action by the Respondent was that the company was seeking reimbursement for the amount of the fine Mr. Hoff received at the weigh station. The company policy stated that such fines were to be paid by the employee receiving the ticket; thus, this request for reimbursement cannot be considered an adverse act to discriminate against Mr. Hoff. Accordingly, the complaint filed with the FMCSA is not a proper claim under Section 31105 because the Complainant failed to allege discrimination or discipline for a protected employee action, enumerated in Section 31105(a). Therefore, his Section 31105 claim was untimely because it was not filed until he contacted OSHA in August 2001, well beyond the 180-day statutory period.

If, however, the claim filed with the FMCSA is properly considered a Section 31105 complaint, then the Complainant filed his complaint with the incorrect agency. In particular, Mr. Hoff filed his claim with an agency under the Department of Transportation, and not OSHA, where a claim under Section 31105 is properly filed. As noted in the Regulations, such action does not justify tolling the 180-day period. Therefore, I find that the complaint was not timely filed.

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<sup>23</sup> *Id.*

<sup>24</sup> 29 C.F.R. § 1978.102(d)(3).

**ORDER**

Accordingly, in view of the foregoing, and based upon the entire record, I hereby recommend that the claim filed under Section 31105 of the Surface Transportation Assistance Act by the Complainant, Christopher J. Hoff, be DISMISSED.

**A**

ROBERT J. LESNICK  
Administrative Law Judge

**NOTICE:** This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., N.W., Washington, D.C. 20210. *See* 29 C.F.R. § 1978.109(a); 61 Fed.Reg. 19978 (1996).